STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: April 15, 2020]

JODY JOHNSON	:	
	:	
VS.	:	**C.A. No. PM-2018-0780**
	:	
STATE OF RHODE ISLAND	:	

DECISION

MONTALBANO, J. This matter is before the Court for decision following a hearing on the application of Jody Johnson (Petitioner or Mr. Johnson) for postconviction relief. Petitioner claims that he did not receive effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, and article I, section 10 of the Rhode Island Constitution. Petitioner also claims a violation of due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. The Court exercises jurisdiction pursuant to G.L. 1956 §§ 10-9.1-1 and 10-9.1-2.

I

Facts and Travel

The facts underlying this case are set forth in *State v. Johnson*, 199 A.3d 1046 (R.I. 2019) and are incorporated by reference herein. On April 10, 2015, Mr. Johnson was charged by criminal indictment with: conspiracy to commit first-degree robbery (Count One); first-degree robbery (Count Two); contributing to the delinquency of a minor (Count Three); and assault with a dangerous weapon in a dwelling with intent to commit robbery (Count Four). Those charges stemmed from an incident that occurred on the evening of January 28, 2014, during which Mr.

Johnson committed robbery and assault with a firearm at the home of Mary Celletti (Ms. Celletti). *Johnson*, 199 A.3d at 1048.

Subsequent to the criminal indictment on April 10, 2015, James T. McCormick, Esquire (Attorney McCormick) was appointed as Mr. Johnson's defense counsel. He entered his appearance on May 6, 2015.

In January of 2017, after four days of trial, the defendant was convicted by a Providence County jury of Counts One, Two, and Four.[1] Mr. Johnson was sentenced to twenty-five years imprisonment with twelve years to serve and the balance suspended, with probation on defendant's first-degree robbery conviction and defendant's assault with a firearm conviction. As to the conspiracy conviction, the defendant was sentenced to ten years imprisonment with ten years to serve. Each sentence was ordered to be served concurrently. On March 27, 2017, a hearing was held on Mr. Johnson's renewed motion for judgment of acquittal and motion for a new trial and was subsequently denied.

Mr. Johnson filed an untimely appeal of his convictions to the Rhode Island Supreme Court, alleging that the trial justice should have granted him a new trial on the grounds that the jury's verdict was against the weight of the evidence. The Supreme Court granted the Petitioner's writ of certiorari, rejected Mr. Johnson's arguments, and affirmed the judgment of the trial court. *See Johnson*, 199 A.3d at 1053.

Petitioner, at the time a *pro se* litigant, filed his first petition for postconviction relief on February 27, 2019 asserting the following grounds for relief: (1) newly discovered evidence; (2) civil rights violations; (3) malicious prosecution; (4) prosecutorial misconduct; and (5) due process

[1] The State dismissed Count Three pursuant to Rule 48(a) of the Superior Court Rules of Criminal Procedure after trial when it realized during sentencing that the Family Court has exclusive jurisdiction over charges brought under G.L. 1956 § 11-9-4.

violations. On that same day, the State filed an answer asserting that the doctrine of laches and the doctrine of res judicata would prevent Petitioner from receiving the postconviction relief he sought.

On March 28, 2019, Attorney Pamela Chin was appointed as Petitioner's counsel in this matter. Attorney Chin subsequently moved to withdraw her representation of Mr. Johnson on September 11, 2019, the motion was granted, and an order to that effect was entered on September 24, 2019. On September 30, 2019, the Court appointed Attorney Kathleen Nee (Attorney Nee or Petitioner's Counsel) to represent Mr. Johnson on his petition for postconviction relief. On October 9, 2019, Attorney Nee entered her appearance on behalf of Petitioner.

Attorney Nee proceeded to file two separate motions: one motion seeking funds for an attorney to testify, as an expert, as to whether defense counsel's failure to file a motion to suppress identification was reasonable, and a second motion seeking to amend Mr. Johnson's postconviction relief petition. Both motions were granted by this Court. An amended petition for postconviction relief was filed by Attorney Nee on November 12, 2019, wherein the grounds for relief were narrowed to (1) ineffective assistance of counsel and (2) violation of due process rights. This Court held an evidentiary hearing on the amended petition on January 6, 2020.

Attorney McCormick testified that he has been practicing civil and criminal law in Rhode Island for 38 years. (Hr'g Tr. 20:2-25, Jan. 6, 2020.) He began handling criminal matters ten years into his practice and so for the last 28 years, approximately 50% of his practice consisted of litigating criminal cases. *Id.* at 20:6-9. Attorney McCormick testified that he has tried an estimated 280 criminal cases and is familiar with the concept of suggestive identification. In fact, Attorney McCormick testified to his in-depth knowledge of suggestive identification after having briefed the issue in a separate case before our Supreme Court. *Id.* at 21:9-14.

Attorney McCormick obtained discovery from the State which included the police reports and the photo array that was shown to the complaining witness, Ms. Celletti. *Id.* at 11:13-23. Attorney McCormick also received the grand jury transcript which included Ms. Celletti's testimony on how she came to know the name of the defendant. *Id.* at 11:24-12:23. During the period of discovery and until the day of trial, Attorney McCormick was under the impression that Ms. Celletti came to know the suspect's name through a disclosure from an unnamed person who may have been a clerk at Family Court. *Id.* at 12:10-23. Before the trial, Attorney McCormick made no further inquiries of the Attorney General's Office, the Family Court, or the complaining witness, Ms. Celletti, as to how the name Jody Johnson was suggested to her. *Id.* at 13:1-7.

With regard to the defense's strategy, Attorney McCormick testified that his overall concern was the suggestive nature of Ms. Celletti's identification of Mr. Johnson. *Id.* at 13:16-14:9. Attorney McCormick explained his understanding of the law regarding suggestive identification. He indicated that a two-part analysis was required: (1) is it a suggestive identification?; and (2) despite it being suggestive, did the witness have an adequate opportunity to observe the identity of the assailant? *Id.* (*citing State v. Gatone*, 698 A.2d 230, 235-37 (R.I. 1997)). He opined that in an identification case, filing a motion to suppress is appropriate especially when there is no other evidence. *Id.* at 14:16-19. However, Attorney McCormick thought that Ms. Celletti had about an hour to an hour and a half to observe the assailant and saw his face up close with adequate lighting. *Id.* at 14:7-15. Since Attorney McCormick thought Ms. Celletti had an adequate opportunity to observe the assailant, he decided there was no point in filing a motion to suppress. *Id.* at 14:16-17. Although there was no physical or forensic evidence produced by the State in this case, Attorney McCormick believed that it would have been disadvantageous to file a motion to suppress. *Id.* at 14:22-23. He felt as though a motion to

suppress would have been futile, and therefore, decided not to file one as it could potentially give Ms. Celletti a "dress rehearsal" on the types of questions Attorney McCormick would be asking her as a witness at trial. *Id.* at 14:22-15:1. Attorney McCormick was also of the opinion that one of the reasons the case was defensible was that a second proposed witness against Mr. Johnson, the alleged juvenile participant, who identified Mr. Johnson as a participant in the robbery in his testimony to the grand jury, was unavailable to testify at the trial. The State could not find the juvenile witness prior to the trial, and therefore, Attorney McCormick thought it was strategically important not to give the State more time to find this witness against his client. *Id.* at 23:7-18.

Rather than file a motion to suppress, Attorney McCormick's preferred strategy was to present evidence of the suggestive identification in order to persuade the jury to give Ms. Celletti's testimony less weight as well as to attack the credibility of her identification. Attorney McCormick considered Ms. Celletti's failure to pick Mr. Johnson's photo out of a photo array which included a picture of Mr. Johnson prior to her learning the assailant's name from the unnamed person at Family Court or the Attorney General's office to be helpful to the defendant and felt he should emphasize those facts to the jury. *Id.* at 15:10-20. The suggestive nature of the conversation identifying Mr. Johnson as a suspect in this case was pointed out by the defense not only to attack Ms. Celletti's credibility, but also to highlight to the jury that Ms. Celletti would be predisposed to identifying whomever she saw on Facebook as the person who robbed her. *Id.* at 24:17-25:1. Consequently, Mr. McCormick chose not to file a motion to suppress Ms. Celletti's identification of Mr. Johnson in favor of the strategy outlined above.

Next to testify was former Special Assistant Attorney General, Attorney Ryan Stys (Attorney Stys). Attorney Stys worked as a prosecutor in the Office of the Attorney General for the State of Rhode Island for five years. Attorney Stys was one of the prosecuting attorneys in this

matter. Attorney Stys handled the case from some point after the grand jury indictment, working on both the pre-trial and trial stages. *Id.* at 27:5-16. Prior to the trial, Attorney Stys reviewed the grand jury transcript, reviewed the discovery, and met with Ms. Celletti. *Id.* at 27:17-28:12. However, Attorney Stys admitted at the evidentiary hearing that he was unable to fully recall how Ms. Celletti originally came to identify Mr. Johnson. Attorney Stys recalled that Ms. Celletti came to learn that Mr. Johnson was a suspect, either through the juvenile proceedings at Family Court or through a telephone conversation with an unnamed individual from the Attorney General's office. *Id.* at 29:5-25. Attorney Stys did not remember discussing with Ms. Celletti how she came to identify Jody Johnson prior to the trial. *Id.* at 30:25-31:5.

At the evidentiary hearing on January 6, 2020, Petitioner called Attorney Scott Lutes (Attorney Lutes) to testify as an expert witness regarding the reasonableness of counsel's strategic trial decision not to file a motion to suppress identification in this case. The State objected to Attorney Lutes' testimony. The Court heard brief arguments of counsel that day before provisionally allowing Attorney Lutes to testify on January 6, 2020.

This Court, after reviewing the written memoranda of the parties and listening to arguments of counsel, decided not to consider the expert testimony of Attorney Lutes in the context of its consideration of and decision on the instant petition for postconviction relief, denying Petitioner's motion to admit his expert's testimony.

Following the close of the evidentiary hearing, Petitioner's hearing counsel and counsel for the State submitted post-hearing memoranda. Petitioner's counsel electronically filed Petitioner's post-hearing memorandum on February 10, 2020. The State electronically filed its memorandum on February 21, 2020.

II

Standard of Review

Postconviction relief is a statutory remedy '"available to any person who has been convicted of a crime and who thereafter alleges . . . that the conviction violated the applicant's constitutional rights . . . ."' *Higham v. State*, 45 A.3d 1180, 1183 (R.I. 2012) (quoting *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011)); *see* § 10-9.1-1(a)(1). "In this jurisdiction an application for postconviction relief is civil in nature." *Ouimette v. Moran*, 541 A.2d 855, 856 (R.I. 1988); *see also* § 10-9.1-7 ("All rules and statutes applicable in civil proceedings shall apply . . . ."). Therefore, "an applicant for postconviction relief must bear 'the burden of proving, by a preponderance of the evidence, that [such] relief is warranted' in his or her case." *Hazard v. State*, 64 A.3d 749, 756 (R.I. 2013) (quoting *Anderson v. State*, 45 A.3d 594, 601 (R.I. 2012)); *see also Mattatall v. State*, 947 A.2d 896, 901 n.7 (R.I. 2008).

III

Analysis – Ineffective Assistance of Counsel Claim

When evaluating allegations of ineffective assistance of counsel, the Rhode Island Supreme Court has adopted the standard set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Brown v. Moran*, 534 A.2d 180, 182 (R.I. 1987); *Rice v. State*, 38 A.3d 9, 14 n.7 (R.I. 2012); *see also Reyes v. State*, 141 A.3d 644, 654 (R.I. 2016). The "exacting" *Strickland* test is two-pronged. *Perkins v. State*, 78 A.3d 764, 767 (R.I. 2013). "Applicants are required to demonstrate that: (1) 'counsel's performance was deficient in that it fell below an objective standard of reasonableness,' . . . and (2) 'that such deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial.'" *Tassone v. State*, 42 A.3d 1277, 1284-85 (R.I.

2012) (quoting *Lynch v. State*, 13 A.3d 603, 605-06 (R.I. 2011); *Bustamante v. Wall*, 866 A.2d 516, 522 (R.I. 2005)). If an applicant for postconviction relief does not make both showings, '"it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable."' *Simpson v. State*, 769 A.2d 1257, 1266 (R.I. 2001) (quoting *Strickland*, 466 U.S. at 687). Our Supreme Court has instructed that counsel's performance should be considered "in its entirety, and 'when that performance is deficient in a number of respects, then the possibility is greater that an accumulation of serious shortcomings prejudiced the defendant to a sufficient degree to meet the *Strickland* requirement.'" *Hazard*, 64 A.3d at 756 (quoting *Brown v. State*, 964 A.2d 516, 528 (R.I. 2009)). Thus, "the benchmark issue is whether 'counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Bustamante*, 866 A.2d at 522 (quoting *Toole v. State*, 748 A.2d 806, 809 (R.I. 2000)).

A

Performance Prong

Establishing that counsel's performance was constitutionally deficient '"requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment."' *Reyes*, 141 A.3d at 654 (alteration and omission in original) (quoting *Bido v. State*, 56 A.3d 104, 111 (R.I. 2012)). In examining the first prong of *Strickland*, our Supreme Court "requires that scrutiny of counsel's performance be highly deferential, and 'every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Tassone*, 42 A.3d at 1285 (alteration in original) (quoting *Lynch*, 13 A.3d at 606). In that sense, "mere tactical decisions, though ill-advised, do not by

themselves constitute ineffective assistance of counsel." *Toole*, 748 A.2d at 809. This is so because:

> "'Under the reasonably competent assistance standard, effective representation is not the same as errorless representation. . . . Even the most skillful criminal attorneys make errors during a trial. The myriad of decisions which must be made by defense counsel quickly and in the pressure cooker of the courtroom makes errorless representation improbable, if not impossible. This is particularly so since the determination of whether there have been errors is made by a court far removed from the heat of trial combat and with the time necessary to make a reasoned judgment. Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under the reasonably competent assistance standard. To state and prove a claim under this standard, a defendant must allege and demonstrate that his counsel's error clearly resulted from neglect or ignorance rather than from informed, professional deliberation.'" *State v. D'Alo*, 477 A.2d 89, 92 (R.I. 1984) (internal quotation marks omitted) (quoting *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978)); *see also Rice*, 38 A.3d at 18.

After all, "'[e]ffective' does not mean successful." *D'Alo*, 477 A.2d at 91 (quoting *State v. Desroches*, 110 R.I. 497, 501, 293 A.2d 913, 916 (1972)). Counsel's performance, therefore, "must be assessed in view of the totality of the circumstances and in light of 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Hazard v. State*, 968 A.2d 886, 892 (R.I. 2009) (quoting *Heath v. Vose*, 747 A.2d 475, 478 (R.I. 2000)).

Attorney McCormick, who has been a criminal defense lawyer in Rhode Island for twenty-eight (28) years, made a strategic decision at the outset of the trial not to file a motion to suppress the out-of-court and in-court identifications made by the State's principal witness in this case, Mary Celletti. Petitioner argues that Attorney McCormick's failure to file a motion to suppress Ms. Celletti's identifications violated his right to effective assistance of counsel as required by the Sixth Amendment of the United States Constitution and article I, section 10 of the Rhode Island

Constitution. In order to prevail, Petitioner must first establish, by a preponderance of the evidence, that Attorney McCormick's decision not to file a motion to suppress '"fell below an objective standard of reasonableness."' *Tassone*, 42 A.3d at 1284 (quoting *Lynch*, 13 A.3d at 605). At issue is whether it was unreasonable for Attorney McCormick not to file a motion to suppress the identifications of Mr. Johnson by Ms. Celletti as the person who robbed and assaulted her at her home on January 28, 2014.

Our Supreme Court has held that "[i]n evaluating the propriety of an eyewitness identification, the trial justice is to undertake a two-step analysis . . . [the] first step is for the trial justice to determine 'whether the procedure used in the identification was unnecessarily suggestive.'" *State v. Austin*, 114 A.3d 87, 94 (R.I. 2015) (quoting *State v. Brown*, 42 A.3d 1239, 1242 (R.I. 2012); *State v. Texter* 923 A.2d 568, 574 (R.I. 2007)). The Court then explained that even if the trial justice determines that the identification procedures were unnecessarily suggestive, he or she must '"determin[e] whether in the totality of the circumstances the identification was nonetheless reliable.'" *State v. Gallop*, 89 A.3d 795, 801 (R.I. 2014) (quoting *Brown*, 42 A.3d at 1242-43; *Texter*, 923 A.2d at 574)).

Attorney McCormick's overall concern was that Ms. Celletti's identification of Mr. Johnson was improperly suggestive. Hr'g Tr. 13:14-14:3, Jan. 6, 2020.

Attorney McCormick detailed his understanding of the law regarding suggestive identification. He indicated that a two-part analysis was required: whether the identification was suggestive and, despite being suggestive, whether the witness had an adequate opportunity to observe the identity of the assailant. *Id.* (citing *Gatone*, 698 A.2d at 235-37). Attorney McCormick weighed the merits of filing a motion to suppress, especially since there was no other evidence available to the State in this case. *Id.* at 14:16-19. His principal reason for not filing the

motion to suppress was based upon his understanding of the opportunity Ms. Celletti had to observe her assailant—that she had a substantial amount of time to observe the assailant and saw his face up close with adequate lighting. *Id.* at 14:7-15. Thus, he felt there was no point in filing a motion to suppress. *Id.* at 14:16-17. Rather than file a motion to suppress, Attorney McCormick's preferred strategy was to present evidence of the suggestive identification in order to persuade the jury to give Ms. Celletti's testimony less weight, as well as to attack the credibility of her identification.

Attorney McCormick's objective was to present the jury with evidence that would allow him to argue that Ms. Celletti's identification of Mr. Johnson should be disregarded. Hr'g Tr. 23:19-24, Jan. 6, 2020. Because he felt a motion to suppress would ultimately have been futile, Attorney McCormick strategically chose not to file one as it could potentially give Ms. Celletti a "dress rehearsal" on the types of questions he would be asking her on cross-examination. *Id.* at 14:22-15:1.

Attorney McCormick, throughout the trial, meticulously followed his strategy to attack Ms. Celletti's identification of Mr. Johnson as her assailant. In his opening argument, Attorney McCormick emphasized to the jury that the accuracy or inaccuracy of Ms. Celletti's identification was a critical issue in the case. (Ex. 2, Tr. 5:9-12, Jan. 24, 2017.) During cross-examination of Ms. Celletti, Attorney McCormick highlighted her inconsistent statements with respect to which side of Mr. Johnson's glasses she claimed to have observed the tape. (Ex. 3, Tr. 29:3-31:7, Jan. 25, 2017.) In his closing argument to the jury Attorney McCormick highlighted the evidence that Ms. Celletti, two weeks after the robbery, failed to pick Mr. Johnson's photograph out of a photo array which, in fact, contained a photograph of Mr. Johnson. (Ex. 3, Tr. 108:13-109:5, Jan. 26, 2017.) Finally, in his closing argument to the jury, Attorney McCormick reiterated that there was

no physical evidence produced by the State linking the Petitioner to the crimes with which he was charged, and that the only evidence produced by the State was the suggestive identification made by Ms. Celletti. *Id.* at 106:24-107:13, Jan. 26, 2017.

In reviewing Attorney McCormick's decision to forego the filing of a motion to suppress Ms. Celletti's identification of Mr. Johnson as the perpetrator in this case, this Court must strive '"to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Tassone*, 42 A.3d at 1285 (quoting *Lynch*, 13 A.3d at 606). The Court finds that counsel's performance was not constitutionally deficient in this case. Specifically, counsel's tactical decision not to file a motion to suppress Ms. Celletti's identification in this case does not constitute ineffective assistance of counsel. Attorney McCormick's choice not to file the motion to suppress was a choice based upon informed, professional deliberation.

Petitioner argues that there was a reasonable probability that a motion to suppress the out-of-court identification of Mr. Johnson by Ms. Celletti would have been granted. This Court disagrees.

Mr. Johnson argued in his motion for new trial that the identification of Mr. Johnson by Ms. Celletti was tainted by the fact that it was suggestive, noting that when she called the Attorney General's office sometime after February 11, 2014 to find out how the juvenile had made out in Family Court she learned from someone in the Attorney General's office (identity unknown) that a person named Jody Johnson was a suspect in the robbery. She located a male person by the name of Jody Johnson on Facebook and told Pawtucket Police Detective Cute that she was 90% sure Mr. Johnson was the person who robbed her on January 28, 2014. (Ex. 3, Tr. 38:25-42:13, Jan. 25, 2017.)

This Court would likely have found Ms. Celletti's identification of Mr. Johnson to be unduly suggestive. *See State v. Gardiner*, 636 A.2d 710, 715 (R.I. 1994). Had Attorney McCormick filed a motion to suppress in this case and had this Court found the identification to be unduly suggestive, the Court would have proceeded to the second part of the analysis: whether Ms. Celletti's out-of-court identification of Mr. Johnson was independently reliable. The Court would have been required to examine the following five factors in the context of its analysis: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of her prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *State v. Parker*, 472 A.2d 1206, 1209 (R.I. 1984). In fact, this Court ultimately found Ms. Celletti's identification to be independently reliable in the context of its March 27, 2017 decision to deny Defendant Johnson's Motion for New Trial. In that Decision, this Court found Ms. Celletti's testimony to be credible. In that Decision, this Court summarized her testimony regarding the independent reliability of Ms. Celletti's identification of Mr. Johnson as the perpetrator of the robbery on January 28, 2014:

> "She described the man, whom she later identified as the defendant, Jodi Johnson, as big, muscular, black-skinned, wearing a jacket with the hood up and a scarf and glasses. He held the gun less than a foot from her face. . . . She described the glasses as dark, not wire, with a piece of Scotch tape on one side wrapped around a couple of times. She testified that they . . . made her sit on her bed in her bedroom. The bedroom light was on. The defendant took off his scarf. His hood was down, and he was standing about an arm's length away from her. She identified, in Court, the defendant as the man who put the gun to her face and said she was 100 percent sure he was the perpetrator." Ex. 3, Tr. 166:1-15, Mar. 27, 2017.
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> . . .
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> "Ms. Celletti testified that during this time she was able to observe the defendant's face for 15 minutes. She was face-to-face with him in her bedroom with the lights on." *Id.* at 167:3-6.

> . . .
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> "defendant told her if she called the cops, he was coming back for her." *Id.* at 167:10-12.
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> . . .
>
> "He came back in the room, he took the gun from the little boy's hand, he reached into my dirty clothes hamper, which was at the end of my bed, he pulled out a bra, and he took the gun from the boy, and he wiped the prints off the gun." *Id.* at 167:17-21.
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> . . .
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> [Jody Johnson] said to me "you call the cops and I'm coming back. Then he was out the door." *Id.* at 167:25-168:1.

Consequently, had Attorney McCormick filed a motion to suppress prior to trial, and had Ms. Celletti testified as to the aforesaid five factors, this Court would have found her identification of Mr. Johnson as the person who robbed her at gunpoint that day to be independently reliable and would have denied the motion to suppress.

Petitioner argues that Attorney McCormick had a duty to investigate the case and specifically to interview Ms. Celletti, the State's complaining witness, citing standards 4-4.1 and 4-4.3 of the American Bar Association Criminal Justice Standards for the Defense Function, (4th ed. 2017). Specifically, Standard 4-4.1(c) of the ABA's Criminal Justice Standards for the Defense Function, entitled "Duty to Investigate and Engage Investigators" provides, in pertinent part:

> "(c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. . . ."

In any claim made regarding the ineffectiveness of defense counsel, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

Our Supreme Court recognizes that "counsel has a duty to investigate his [or her] client's case." *Neufville v. State*, 13 A.3d 607, 612 (R.I. 2011). However, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (citing *Wiggins v. Smith*, 539 U.S. 510, 525 (2003)).

During the evidentiary hearing on January 6, 2020, Attorney McCormick admitted that prior to trial he did not speak with Ms. Celletti and did not send an investigator to speak with her. (Hr'g Tr. 12:24-13:3, Jan. 6, 2020.) In developing his trial strategy, Attorney McCormick was concerned about the suggestiveness of Ms. Celletti's identification of Mr. Johnson as the perpetrator of the robbery. *Id.* at 13:14-14:3. Prior to determining his defense strategy, Attorney McCormick reviewed the discovery, researched the issue of identification, obtained the photo array that was shown to Ms. Celletti, reviewed her statements, including the transcripts of her Grand Jury testimony, and reviewed police reports. *Id.* at 11:5-12:23. He was also aware that the juvenile witness who identified Mr. Johnson as the perpetrator of the crimes during his Grand Jury testimony was unavailable to testify at the trial because the State was unable to locate him. *Id.* at 23:7-18. After his investigation Attorney McCormick strategically chose not to file a motion to suppress Ms. Celletti's identification of Mr. Johnson as the perpetrator of the crimes. *Id.* at 14:16-15:1. This Court is satisfied that had Attorney McCormick or an investigator interviewed Ms. Celletti as part of his investigation it would not have altered his defense strategy. This Court

specifically finds that Mr. McCormick's investigation of the case prior to trial was sufficient and did not constitute ineffective assistance of counsel.

This Court finds that Attorney McCormick's tactical decision to forego the filing of a motion to suppress identification in this case was reasonable "in view of the totality of the circumstances." *Hazard*, 968 A.2d at 892 (citing *Heath*, 747 A.2d at 478). In this case, the decision whether to file a motion to suppress or not was a tactical one. The *Strickland* Court cautioned against subjecting trial counsel's actions to intensive scrutiny with regard to considering an ineffective assistance of counsel claim. 466 U.S. at 669 ("Judicial scrutiny of counsel's performance must be highly deferential.") "[A] court must distinguish between tactical errors made as a result of ignorance and neglect and those arising from careful and professional deliberation." *D'Alo*, 477 A.2d at 92 (citing *Bosch*, 584 F.2d at 1121). "Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under the reasonably competent assistance standard." *Bosch*, 584 F.2d at 1121.

Even assuming that Petitioner is correct that the filing of a motion to suppress would have successfully negated Ms. Celletti's identification of Mr. Johnson in this case, he has failed to prove ineffective assistance of counsel. Certainly, effective representation does not equate to successful representation. *See D'Alo*, 477 A.2d at 91. Attorney McCormick chose and vigorously pursued a particular trial strategy—the one that he thought gave his client the best chance of success. The Court does not view his strategic decision as an erroneous one, but even if it was, "mere tactical decisions . . . do not by themselves constitute ineffective assistance of counsel." *Toole*, 748 A.2d at 809. The Court's review of Attorney McCormick's trial strategy will not be distorted by the 20/20 vision of hindsight. *See Lynch*, 13 A.3d at 606; *D'Alo*, 477 A.2d at 92.

In '"look[ing] at the entire performance of counsel," the Court is satisfied that Petitioner received effective assistance of counsel.'" *Tassone,* 42 A.3d at 1286 (alteration in original) (quoting *Brown,* 964 A.2d at 528). The Court cannot conclude that Attorney McCormick's performance '"was deficient in that it fell below an objective standard of reasonableness. . . ."' *Id.* at 1284 (quoting *Lynch,* 13 A.3d at 605); *see also Page v. State*, 995 A.2d 934, 945 (R.I. 2010). This Court is satisfied that Attorney McCormick's trial performance certainly fell within the wide range of reasonable professional assistance to which Petitioner was entitled. *Id.* Accordingly, Petitioner has not satisfied the first prong of the *Strickland* test.

B

Prejudice Prong

Because of Petitioner's failure to prove that Attorney McCormick's representation was constitutionally deficient, the Court need not—and will not—address the second prong of the *Strickland* standard. *See Page,* 995 A.2d at 945 (declining to consider the second *Strickland* prong (prejudice) when "counsel's performance was reasonable and, as such, did not run afoul of even the first prong (deficiency) under the *Strickland* test"); *see also Tassone*, 42 A.3d at 1284-85 (quoting *Bustamante*, 866 A.2d at 522 (requiring under the prejudice prong a showing '"that such deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial'"). Nevertheless, this Court notes that in no way was Petitioner's conviction a result of Attorney McCormick's representation, and Attorney McCormick's performance did not prejudice Petitioner. It is clear to this Court that Petitioner received a fair trial and effective assistance of counsel.

IV

Analysis – Violation of Due Process Rights

The Due Process Clause of the Fourteenth Amendment of the United States Constitution, as interpreted by *Brady v. Maryland*, 373 U.S. 83 (1963), requires the prosecution to disclose material evidence to a criminal defendant. *State v. Chalk*, 816 A.2d 413, 418 (R.I. 2002) (citing *Brady*, 373 U.S. at 87). In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; *see also Tempest v. State*, 141 A.3d 677, 682 (R.I. 2016). Later cases further explained that the prosecution has a duty to disclose even in the absence of a request by the accused. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Thus, the prosecution's duty to disclose such evidence includes impeachment material as well as purely exculpatory evidence. *Id.*

In determining the "materiality" standard of the evidence, a defendant must show a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley*, 473 U.S. at 682. An applicant claiming a *Brady* violation '"need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted.'" *See Tempest*, 141 A.3d at 686 (quoting *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016)). Rather, it is enough to show a '"reasonable probability'" that the outcome would have been undermined. *Id.* (quoting *Lerner v. Moran*, 542 A.2d 1089, 1091 (R.I. 1988)).

If the State has failed to disclose *Brady* material, and "the failure to disclose is deliberate, [the] [C]ourt will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; [it must] simply grant the defendant a new trial." *State v. Wyche*, 518

A.2d 907, 910 (R.I. 1986). The prosecution acts deliberately when "it makes 'a considered decision to suppress . . . for the purpose of obstructing' or where it fails 'to disclose evidence whose high value to the defense could not have escaped . . . [its] attention.'" *Wyche*, 518 A.2d at 910. When the failure to disclose evidence is not deliberate, the Court must balance the culpability of the prosecution with the materiality of the evidence in determining whether a new trial is appropriate. *In re Ouimette*, 115 R.I. 169, 177, 342 A.2d 250, 254 (1975).

The *Brady* doctrine has its limits and does not permit a defendant "to comb prosecution files for any or all information that might be remotely useful." *Wyche*, 518 A.2d at 908. The State is not "responsible for delivery of information outside [its] custody and control." *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 111 (1976). Thus, the nondisclosed information still must be material in the sense that its "high value to the defense could not have escaped . . . [the prosecution's] attention. *Id.* at 910.

Petitioner asserts that the prosecution did not timely disclose that Ms. Celletti learned that Mr. Johnson was a suspect in the robbery from an unknown person in the Attorney General's office, rather than from a clerk in the Family Court. The Petitioner argues that the failure to make this disclosure was highly improper and constituted a violation of due process, and that had Attorney McCormick been aware of this information earlier, his decision to forego the filing of a motion to suppress would have been different. In response, the State argues that the State's allegedly late disclosure did not prevent Attorney McCormick from altering his defense strategy with respect to whether or not to file a suppression motion.

In order to prevail on a *Brady* claim, a '"petitioner must demonstrate: (1) the evidence at issue is favorable to him because it is exculpatory or impeaching; (2) the Government suppressed the evidence; and (3) prejudice ensued from the suppression (i.e., the suppressed evidence was

material to guilt or punishment).'" *Bucci v. United States*, 662 F.3d 18, 38 (1st Cir. 2011) (quoting *Conley v. United States*, 415 F.3d 183, 188 (1st Cir. 2005)). While the evidence as to how Ms. Celletti learned that Mr. Johnson was a suspect in the robbery could certainly be (and was) used to impeach Ms. Celletti's identification of Mr. Johnson, it does not appear to the Court that the Government suppressed this evidence. At best, there was a late disclosure by the State on the day of trial. The Court finds that no prejudice ensued from the late disclosure, since Mr. McCormick used the information disclosed in his cross-examination of Ms. Celletti and in his closing argument to the jury at the trial. (Ex. 3, Tr. 38:25-42:13, Jan. 25, 2017; *Id.* at 112:113-25.)

Moreover, in the instant case, this Court is not convinced that any *Brady* violations have occurred. During trial and at the evidentiary hearing, Ms. Celletti's testimony established that she learned of the Petitioner's name through a telephone conversation with a female at the Attorney General's office, rather than learning his name from an individual working in the Family Court. (Ex. 3, Tr. 44:23-46:8, Jan. 25, 2017); PCR Tr. 3:17-4:20, Jan. 6, 2020. Attorney McCormick was made aware of the correct source of the information by Assistant Attorney General Stys prior to the start of the trial. Nevertheless, the corrected information did not alter Attorney McCormick's considered trial strategy not to file a motion to suppress. Rather, Attorney McCormick maintained his opinion that filing a motion to suppress would have been futile in light of Ms. Celletti's opportunity to observe her assailant during the robbery on January 28, 2014. PCR Tr. 22:3-19. Consequently, the State's disclosure on the day of trial did not serve to change Attorney McCormick's strategic decision to forego the filing of a motion to suppress, nor would the result of the trial have been different.

Additionally, this Court does not find that the State acted deliberately in withholding this information from the defense. Although defense counsel received this evidence shortly before

trial, the State nevertheless produced the corrected information to the defense, presumably in compliance with its obligations under *Brady*. Attorney McCormick utilized this evidence in presenting his defense during both cross-examination and during closing argument in an effort to convince the jury that the identification was suggestive and should be given little or no weight. (Ex. 3, Tr. 38:25-42:18, Jan. 25, 2017; *Id.* at 112:13-25; *Id.* at 114:9-115:4, Jan. 26, 2017.) In any event, this Court is not convinced that the State's allegedly late disclosure had any impact whatsoever on Attorney McCormick's trial strategy, nor did it affect the outcome of the trial. *See Tempest*, 141 A.3d at 686.

Petitioner has failed to prove, by a preponderance of the evidence in this case, that his due process rights under the Fourteenth Amendment of the United States Constitution were violated. Specifically, this Court finds that the prosecution did not fail to disclose material evidence to the Petitioner in violation of his constitutional rights as interpreted by *Brady*. The evidence cited by the Petitioner in his allegation of *Brady* violations was not material either to guilt or punishment. Further, the Petitioner has failed to show a reasonable probability that, had the evidence been disclosed earlier to the defense, the result of the trial would have been different or that there was a reasonable probability that the outcome would have been undermined. This Court is satisfied that Mr. Johnson was afforded due process in this case.

V

Conclusion

In not pursuing a motion to suppress the identification of the Petitioner by Ms. Celletti as the person who robbed her at gunpoint in her home on January 28, 2014, Attorney McCormick made a strategic decision that constituted the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, and article I, section 10 of the Rhode Island Constitution. Petitioner has failed to meet his burden of proving his claim of ineffective assistance of counsel. Petitioner's Application for Post-Conviction Relief on those grounds is therefore denied.

Petitioner has also failed to meet his burden of proving his claim that his constitutional due process rights under the Fifth and Fourteenth Amendments of the United States Constitution were violated as the prosecution did not fail to disclose material evidence to the Petitioner as interpreted by *Brady*. Petitioner's Application for Post-Conviction Relief on those grounds is therefore denied.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Jody Johnson v. State of Rhode Island
CASE NO:	PM-2018-0780
COURT:	Providence County Superior Court
DATE DECISION FILED:	April 15, 2020
JUSTICE/MAGISTRATE:	Montalbano, J.
ATTORNEYS:	
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For Defendant:	Jeanine P. McConaghy, Esq.